Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

GREGORY S. SHEALY,
Petitioner,

v.

REGINA E. SHEALY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the Hague Convention on the Civil Aspects of International Child Abduction, ratified by the United States under Article VI of the United States Constitution, require United States courts to recognize a foreign court's rights of custody over a child when such rights are asserted by the left-behind parent in proceedings seeking the return of an abducted child?

PARTIES TO THE PROCEEDING

Petitioner

Petitioner is Gregory S. Shealy ("Petitioner" or "Mr. Shealy"), an individual citizen of the United States, residing in the Republic of Germany. Mr. Shealy was the Petitioner in the United States District Court for the District of Colorado and the Appellant in the United States Court of Appeals for the Tenth Circuit.

Respondent

Respondent is Regina E. Shealy ("Respondent" or "Ms. Shealy"), an individual citizen of the United States, residing in the District of Colorado. Ms. Shealy was the Respondent in the United States District Court for the District of Colorado and the Appellee in the United States Court of Appeals for the Tenth Circuit.

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Petitioner, Gregory S. Shealy, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on July 8, 2002.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit ("Court of Appeals") that gives rise to this petition is published at 295 F.3d 1117 (10th Cir. July 8, 2002) (hereinafter "*Shealy*"). It is reprinted in Appendix A, and attached hereto (App. A) at 1a. The opinion of the United States District Court for the District of Colorado ("District Court") is unreported but is reprinted in Appendix B, and attached hereto (App. B) at 1b.

STATEMENT OF JURISDICTION

On August 6, 2001, the District Court issued a Memorandum Opinion denying Mr. Shealy's Petition for Return of Child filed pursuant to the Hague Convention on the Civil Aspects of International Child Abduction ("the Convention" or "the Treaty"). Mr. Shealy filed a timely Notice of Appeal to the Court of Appeals. On July 8, 2002, following oral argument, the Court of Appeals formally entered its Order affirming the decision of the District Court. Pursuant to Supreme Court Rule 13.1, this petition has therefore been timely filed within 90 days of the entry of the Court of Appeals' judgment. The jurisdiction of the Court is thus invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED IN THIS CASE

The underlying treaty is The Hague Convention on the Civil Aspects of International Child Abduction, *opened for*

signature October 25, 1980, T.I.A.S. No. 11,670; *instrument of U.S. ratification deposited* April 29, 1988, S. Treaty Doc. No. 99-11, *reprinted in* 19 I.L.M. 1501 (1980); 51 Fed. Reg. 10,494 (1986).

Article 3 of the Convention provides:

The removal or the retention of a child is to be considered wrongful where:

(a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

(b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

Article 5 of the Convention provides:

For the purposes of this Convention:

(a) 'rights of custody' shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence;

(b) 'rights of access' shall include the right to take a child for a limited period of time to a place other than the child's habitual residence.

The implementing legislation for the Convention is the International Child Abduction Remedies Act ("ICARA"), adopted in 1988 and codified in Title 42, United States Code, Sections 11601-11610.

Title 42, United States Code, Section 11601(b)(3) states:

(3) In enacting this chapter the Congress recognizes—

(A) the international character of the Convention; and

(B) the need for uniform international interpretation of the Convention.

STATEMENT OF THE CASE

Ms. Shealy secretly removed the parties' five-year-old child, Sierra, from Germany to avoid an anticipated unfavorable ruling in an ongoing German custody proceeding. Utilizing her status as a member of the United States Army, Ms. Shealy improperly engaged in deception to manipulate the system and avoid the jurisdiction of the German court. Although both the District Court and Court of Appeals expressed their grave concern over the Respondent's actions in removing Sierra from Germany, Ms. Shealy's plan succeeded. App. 10a; 10b. The court below refused to consider whether the German court possessed protected rights of custody over Sierra under the Convention by virtue of an ongoing custody proceeding in that court. App. 8a n.3. By

refusing to consider whether Ms. Shealy's scheme deprived the German court of Article 3 custody rights the court itself was exercising over Sierra, the Court of Appeals decision departs from the intent, object and purpose of the Convention and has abrogated the treaty obligations of the United States to its sister signatories. In addition, the Court of Appeals holding directly conflicts with United States and foreign precedent holding that both ICARA and Article 3 of the Convention permit a party to attribute rights of custody to a court by virtue of the jurisdiction it exercises over a pending custody matter. Accordingly, pursuant to the provisions of the Convention and ICARA, Mr. Shealy seeks the return of Sierra to Germany.

Mr. Shealy brought this action against Ms. Shealy on June 1, 2001, asserting that Ms. Shealy had wrongfully removed Sierra from Germany to this country. App. 1b. In accordance with the requirements of the Convention and ICARA, Mr. Shealy requested the immediate return of Sierra to Germany so that the German Family Court could continue with a pending proceeding to determine the custody rights of the parties. App. 2b. After a full evidentiary hearing, the District Court found that Mr. Shealy had demonstrated, by a preponderance of the evidence, all of the essential elements he must prove under the Convention to obtain the return of his daughter: (1) the child's habitual residence was in Germany; (2) German law afforded him custody rights with respect to Sierra; and (3) Mr. Shealy was exercising those rights over Sierra up to the time that she was secretly removed from Germany by Ms. Shealy. App. 7b-9b. Nevertheless, in denying Mr. Shealy's Petition, the District Court concluded that although the case was close, the removal of Sierra to the United States was not "wrongful", but warranted on the grounds of "military necessity." App. 9b.

Prior to fleeing Germany with Sierra, *Ms. Shealy* petitioned the German Family Court for custody of Sierra in the context of contemporaneous divorce proceedings in the same court. App. 3a. On July 26, 2000, the Family Court issued an *interim* decision awarding Ms. Shealy temporary domicile determination rights. App. 3a. The German Family Court made clear that it had not altered or permanently decided the custodial rights of either party. App. 3a; 4b. That interim order expressly forbade Ms. Shealy from removing Sierra from Germany unless it became necessary for "military reasons." App. 3a. On September 9, 2000, Mr. Shealy filed a cross-application for custody of Sierra seeking to alter the previous domicile-determination ruling in favor of Ms. Shealy. App. 8a. Thereafter, on February 14, 2001, the German Family Court ordered that an opinion be obtained from a court-appointed social worker in an effort to determine which parent should have custody. App. 3a. This court-ordered meeting between Ms. Shealy and the social worker was scheduled for March 20, 2001. App. 4b.

Fearing that the court-appointed social worker might find Mr. Shealy to be the better parent, Ms. Shealy secretly requested that the United States Army immediately curtail her then-present assignment in Germany. App. 3a. In her written request, Ms. Shealy expressly stated that she desired the Army's prompt assistance to obtain a more favorable venue for her custody application. App. 3a; 5b. Ms. Shealy also implied to her superiors that she alone possessed sole custody over Sierra.[1] Deceived by these representations, the

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[1] Although this fact was not expressly addressed in either of the Court of Appeals or District Court's Memorandum Opinions, Ms. Shealy conceded at the full evidentiary hearing that her February 21, 2001 letter to the Army stating that "[a]s of right now, I have

Army issued military transfer orders to Ms. Shealy on March 14, 2001, requiring her to report for new assignment at Fort Carson, Colorado no later than July 31, 2001, months after the expected decision by the German Family Court. App. 3a. Just one day later, however, Ms. Shealy requested ordinary leave from her post for the period of March 19, 2001 to March 28, 2001, a request made with full knowledge of her court-ordered interview with a social worker set for March 20, 2001. App. 10b. On March 19, 2001, Ms. Shealy used this ordinary leave to secret Sierra out of Germany to a friend's home in Alabama. App. 3a-4a; 4b. Notwithstanding Ms. Shealy's admission of these underhanded actions, the District Court found that a military necessity existed by virtue of Ms. Shealy receiving her military transfer orders on March 14, 2001. App. 11b.

Taking an immediate appeal, Mr. Shealy argued that, in clear violation of Article 3 of the Convention, the District Court erred in failing to consider the custody rights exercised by the German Family Court itself over the child, by virtue of jurisdiction afforded it by Ms. Shealy's original custody petition, and *more importantly, by Mr. Shealy's own subsequent application for transfer of domicile determination rights for Sierra*. App. 6a. In short, Mr. Shealy explained that the District Court's order was tantamount to allowing United States servicemen and women to abduct children freely across international borders to obtain a more favorable forum for a custody dispute, provided only that the abducting parent first manufacture his or her own "military necessity," as Ms. Shealy had done. App. 10a. Despite expressing disdain over

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custody of Sierra" was inaccurate in that she only possessed temporary domicile determination rights as per the July 26, 2000 interim order. Aplt. App. at 147-48; Aplt. Br. at 7.

Ms. Shealy's manipulation of the armed services to accomplish what the Convention was created to prevent---a parent removing a child from a country in order to avoid the jurisdiction of local courts---the Court of Appeals affirmed the District Court's holding notwithstanding clear international precedent supporting Mr. Shealy's position and the incorrect construction of the Convention. App. 10a-13a.

The question on which certiorari is sought is one of exceptional importance and involves the interpretation of the only international treaty on child abduction: The Hague Convention of October 25, 1980 on the Civil Aspects of International Child Abduction. The opinion of the Court of Appeals departs from the stated intent, object and purpose of both ICARA and the Convention and represents the United States' abrogation of its obligations to its sister signatories. The rulings by the courts below also disrupt the operation of the Convention and directly conflict with both United States and foreign precedent allowing left-behind parents to assert the custody rights of a court over a child as the triggering mechanism for a petition of return. Accordingly, review by this Court is essential.

At the Court of Appeals, the crucial issue was whether Mr. Shealy's cross-application for custody of Sierra to the German Family Court afforded that court, within the plain meaning of the Convention, rights of custody over Sierra pending final resolution of the German custody matter---rights violated by Ms. Shealy's secret removal of Sierra from Germany. In a footnote to its Memorandum Opinion, the Court of Appeals held that it need not determine whether the Petitioner could seek return of the child based upon the violation of the custody rights of a party other than himself. App. 8a n.3. This ruling, however, cannot be reconciled with Article 3 of the Convention which expressly provides: "The

removal or the retention of a child is to be considered wrongful where: (a) it is in breach of rights of custody attributed to a person, *an institution or any other body*, either jointly or alone, ..." In short, the intent, object and purpose of the drafters was clearly to allow left-behind parents to rely upon the jurisdiction of an entity possessing such rights to secure the return of an abducted child. The Court of Appeals decision also conflicts with decisions in the United States and other Convention countries that permit a left-behind parent to assert the jurisdiction of a court as a protected custody right under the Convention. *See Fawcett v. McRoberts*, 168 F. Supp. 2d 595 (W.D.Va. 2001); *Re H. (Child Abduction: Rights of Custody)*, 2 All E.R. 1, 1 F.L.R. 374 (H.L. 2000) (attached hereto as Appendix C, 1c); *Thomson v. Thomson*, 3 S.C.R. 551, 119 D.L.R. (4th) 253 (Can.); *H.I. v. M.G.*, [1999] 2 I.L.R.M. 1 (Ir. S.C.).

In 42 U.S.C. § 11601(b)(3), Congress, among its "Finding and declarations", states:

> (3) In enacting this chapter the Congress recognizes;
>
> > (A) the international character of the Convention; and
> > (B) the need for uniform interpretation of the Convention.

Thus, there is express congressional recognition of the need for the courts in the United States to strive for uniform interpretation of the Convention's provisions.

The Hague Convention now has 62 State parties. The *Shealy* decision interferes with the uniformity of Article 3, the heart of the Convention's provisions. Accordingly, the ruling undermines the protection of families and presents huge

embarrassment for the United States. In sum, the Court of Appeals has departed from both the letter and spirit of the Convention in refusing even to address, let alone recognize, whether Mr. Shealy correctly premised his Petition for Return of his daughter on the Respondent's violation of the German Family Court's rights of custody over the child pending that court's final custody resolution. This ruling has created a conflict with at least one other United States court's interpretation of the Treaty and with several decisions of the highest courts of our treaty partners. It is therefore paramount that this Court review the issue raised by this petition for certiorari.

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals Decision Represents an Abrogation of the United States Treaty Obligations Because It Contravenes the Express Intent, Object and Purpose of the Convention.

The issue involves a crucial interpretative question regarding the obligations of the United States under the Hague Convention on the Civil Aspects of International Child Abduction. The United States ratified the Convention in 1988 and has obligations under it to the 62 countries with whom the United States has ratified the Treaty. The seminal obligation under the Convention requires that a child wrongfully removed from the country of his or her habitual residence must be returned so that the courts in the child's habitual residence can determine the merits of the custody controversy. Letter of Transmittal to United States Senate from Ronald Reagan, *accompanying certified copy*, Hague Convention on the Civil Aspects of International Child Abduction, October 30, 1985, at 1; 51 Fed. Reg. at 10,495.

Such a wrongful removal or retention occurs when the removal is in violation of "custody rights" under the law of the habitual residence. Convention, art. 3. More specifically, Article 3 of the Convention provides that the removal or retention of a child is "wrongful" where:

> (a) it is in breach of rights of custody attributed to a person, *institution or any other body, either jointly or alone*, under the law of the State in which the child was habitually resident immediately before the removal or retention; and
>
> (b) at the time of removal or retention those rights were actually exercised either jointly or alone, or would have been so exercised but for the removal or retention (emphasis added).

In addition, under the Convention, "'rights of custody' shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence." Convention, art. 5.

Here, the Respondent availed herself of the German Family Court's jurisdiction by seeking full custody of Sierra in June 2000. On July 26, 2000, the Family Court issued an interim order awarding the Respondent temporary domicile determination rights pending further investigation of the parties and a final custody order. App. 3a. Equally significant, however, is the Petitioner's own subsequent September 9, 2000 application to the Family Court for a transfer of the domicile determination rights, an application

not yet ruled upon.[2] Because Sierra was removed from Germany prior to a final custody decision of the Family Court or the Petitioner's own application, the question the Court of Appeals chose to ignore remains whether the Family Court itself was vested with custody rights over Sierra pending its final decision such that her removal was wrongful under Article 3 of the Convention. This crucial question was ignored by the Court of Appeals despite the plain language of the Convention.

Interpreting the phrase "custody rights" requires consideration of the stated intent, object and purposes of the Convention. *See Flores v. Contrerra*, 981 S.W.2d 246, 250 (Tx. App. 1998) (rejecting unreasonable construction of the Convention and stating that "[c]ourts should not interpret a statute to create absurd results"); Restatement (Third) of Foreign Relations Law § 325 (1) (1987) ("An international agreement is to be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose."). *See also United States v. Alvarez-Machain*, 504 U.S. 655, 663, 112 S. Ct. 2188 (1992) (in construing a treaty, as in construing a statute, we first look to its terms to determine its meaning); Vienna Convention on the Law of Treaties, May 23, 1969, art. 31.1, 1155 U.N.T.S. 331, 340. As a threshold matter, the remedy of return envisioned by the Convention's drafters was supposed to discourage abductions and locate each custody contest in the forum where most of the relevant evidence was located. *See* Letter of Transmittal, at 1. Indeed, the preamble to the Convention sets forth the drafters' desire to "protect children internationally from the harmful effects of their wrongful removal or retention and to establish

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[2] Aplt. App. at 147-48; Aplt Br. at 5, 24, 28.

procedures to ensure their prompt return to the state of their habitual residence, as well as to secure protection for rights of access." Convention, preamble.

Article 3 is the cornerstone of the Convention. It must be initially analyzed by examining the question of "who holds rights protected by the Convention, or, with respect to whom is the removal or retention deemed to be wrongful?" *See* Public Notice 957, Hague International Child Abduction Convention; Text and Legal Analysis, 51 Federal Register 10,494, 10,505 (Department of State, March 26, 1986). Subsection (a) of Article 3 addresses this question head-on, clearly enunciating that the removal of a child is wrongful where it is in breach of the rights of custody attributed to a person, *institution or any other body*. Convention, art. 3(a). While many abduction cases may involve rights of custody attributed to one parent, or perhaps to an extended family member, the language of the Convention plainly recognizes that enforceable custody rights may vest in a third party agency or court. Congress recognized this intent upon becoming a signatory to the Treaty, as reflected by the following explanatory comments: "institutions such as public or private child care agencies may also have custody rights the breach of which would be remediable under the Convention." 51 Fed. Reg. at 10,506. Moreover, that this adopted language was purposely broad and vague so as to apply to a wide range of "legal persons" is reflected in the official commentary to the Convention:

> On the other hand, legal persons can also, in terms of the Convention, hold rights of custody. Article 3 envisages the possibility of custody rights being attributed to 'an institution or any other body', and is expressed in deliberately vague and wide terms. In fact,

> during the Fourteenth Session, the inclusion within the scope of the Convention of situations in which the child is entrusted to an institution was not challenged. Now, since there are bodies other than institutions which have children in their care, the term used was extended so as to apply equally to those bodies with legal personality and to those which, as an arm of the State, lack separate legal personality.

Eliza Perez-Vera, *Explanatory Report: Hague Conference of Private International Law* ¶ 80 (1980). Accordingly, it defies logic to suggest that in becoming a signatory to the Convention, Congress knowingly curbed a party's ability to raise the pending jurisdiction of a court (the arm of government most often entrusted with protecting the well-being of our children) as a recognizable holder of custody, the breach of which by an abducting parent triggers the right for return under the Convention.

In the instant case, therefore, the Court of Appeals' decision not to consider the jurisdiction of the German Family Court as a protected custody right violates the clear intent, object and purpose of the treaty recognized by both its drafters and the United States Congress. In June 2000, the Respondent petitioned the German Family Court for custody of Sierra. Thereafter, on July 26, 2000, that court issued an interim order, pending further social services interviews with the family, awarding the Respondent domicile determination rights for Sierra. App. 3a. Contained within this interim order was a *ne exeat* clause precluding the Respondent from removing Sierra from Germany unless a "military necessity" existed. App. 3a. Although the District Court and Court of Appeals ultimately ruled that the German Family Court's *ne*

exeat clause[3] was (1) conditional, and (2) that a "military necessity" did exist such as to warrant the Respondent's removal of Sierra from Germany, both courts ignored the impact of the Petitioner's own subsequent September 9, 2000 application for transfer of domicile determination rights by the continuing jurisdiction of the Family Court. App. 13a; 15b. In short, this separate September 9, 2000 application not only reinforced the Family Court's jurisdiction over the already-pending custody matter, but also conferred upon it rights of custody over Sierra under Articles 3 and 5 of the Convention, such that the child's removal was in violation of those rights. To date, the Petitioner's application has not been ruled upon and the matter remains open in the German Family Court pending Sierra's return to Germany. App. 5a. Accordingly, the Court of Appeals erred by failing to: (1) recognize that the plain language of the Convention contemplates courts as holders of custody rights; and (2) rule that the "conditional" *ne exeat* clause was superseded by the Petitioner's September 9, 2000 application which separately vested the Family Court with protected custody rights over Sierra under the Convention.

II. The Decision in *Shealy* Is In Direct Conflict With Both United States and Foreign Case Law.

In addition to violating the spirit and intent of the Convention, the Court of Appeals decision creates an untenable conflict with rulings of other courts construing Article 3 of the Convention. In construing the terms of an

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[3] A *ne exeat* clause is a provision that restricts a party from removing the child from the jurisdiction without the other parent's or court's permission.

international treaty, the Supreme Court of the United States has found "the opinions of our sister signatories to be entitled to considerable weight." *See Air France v. Saks*, 470 U.S. 392, 494, 105 S. Ct. 1338 (1985) (quoting *Benjamins v. British European Airways*, 572 F.3d 913, 919 (2d Cir. 1978). The Convention, itself, is premised on a mutual trust between participating nations to protect the children who need protection and to decide cases fairly when only one litigant is a national. *See Blondin v. Dubois*, 78 F. Supp. 2d 283, 299 (S.D.N.Y. 2000).

Importantly, no logical reason exists for United States courts to ignore foreign courts' decisions resolving legal questions under the Convention. "In fact, the notion of comity, broadly conceived, supports such deference." Merle H. Weiner, *Navigating the Road Between Uniformity and Progress: The Need for Purposive Analysis of the Hague Convention on the Civil Aspects of International Child Abduction*, 33 Col. Human Rights L. Rev. 275, 286 (2002). Both United States and foreign courts have recognized that comity "is at the heart of the Convention." *See Friedrich v. Friedrich*, 78 F.3d 1060, 1068-69 (6th Cir. 1996); *Blondin v. Dubois*, 189 F.3d 240, 248 (2d Cir. 1999); *Blondin v. Dubois*, 238 F.3d 153, 160 n.8 (2d Cir. 2001); *Re H. (Child Abduction: Rights of Custody)*, 2 All E.R. 1 (H.L. 2000). Such comity does "not require a factually intensive analysis of the fairness of the foreign system. Rather, comity as a canon of construction requires only an acknowledgment that the United States' treaty partners are equally capable of resolving legal questions under the Convention." Weiner, at 288.

A uniform interpretation of the Convention is especially important given its stated purpose of deterring the practice of international child abduction. "Absent a uniform

interpretation, potential abductors may be encouraged to abduct, believing they can exploit divergent legal interpretations and thereby avoid the Convention's application and sanction." *Id.* at 289; *see Mozes v. Mozes*, 239 F.3d 1067, 1072 (9th Cir. 2001) ("[t]o achieve uniformity of application across countries, upon which depends the realization of the Convention's goals, courts must be able to reconcile their decisions with those reached by other courts in similar situations."). That Congress recognized the international character of the Convention's provisions and "need for uniform international interpretation" is reflected in ICARA, Section 11601(b)(3) (stating that "(3) [i]n enacting this chapter the Congress recognizes (A) the international character of the Convention; and (B) the need for uniform interpretation of the Convention"). *See also* Paul R. Beaumont & Peter E. McEleavy, *The Hague Convention on International Child Abduction* 1, 238 (1999) ("[o]nly in exchanging and considering other views will a sophisticated and uniform interpretation evolve.").

Finally, the "maxim of treaty interpretation referred to as 'good faith' requires a presumption of uniformity." *Id.* at 290. This good faith refers to our courts' desire to "give credence to the meaning ascribed by one of our treaty partners" so as to protect the United States from "a charge of treaty breach." David J. Bederman, *Revivalist Canons and Treaty Interpretation*, 41 U.C.L.A. L. Rev. 953, 968 (1994). In sum, non-uniform interpretations of the Convention by United States Courts may lead our sister signatories "to conclude that the United States has withdrawn its consent to be bound by the treaty" because such unconventional actions can be seen as "implicit abrogation." Weiner, at 291 (quoting Ian Johnstone, *Treaty Interpretation: The Authority of Interpretive Communities*, 12 Mich. J. Int'l L. 371, 384-85 (1991). Accordingly, while our courts are not technically

"bound" by the holdings of our sister signatories, this "freedom from the doctrine of *stare decisis* does not, in and of itself, supply a good reason to ignore a consensus as to construction." Weiner, at 291.

In its decision in *Shealy*, the Court of Appeals failed to acknowledge or even consider the existence and import of both United States and international precedent that is inconsistent with its decision. *See Re H. (Child Abduction: Rights of Custody)*, 2 All E.R. 1 (H.L. 2000);[4] *Fawcett v. McRoberts*, 168 F. Supp. 2d 595 (W.D.Va. 2001). Most importantly, the Court of Appeals failed even to mention these conflicting decisions by name or comment upon their nearly identical factual underpinnings. In *Re H.*, the mother, via an interim order, was granted custody of a child while the father was given certain rights of access with a right to re-apply for custody at a later time. App. 2c. The father later filed an application with the trial court requesting that he be appointed guardian of the child. App. 3c. Before the court could rule on his application, the mother fled the country with the child. In a unanimous decision, the House of Lords held that the trial court possessed "rights of custody in respect of H. at the time of her removal and that these rights were being exercised *by reason of the pending application of her father to be appointed her guardian*. App. 13c. (emphasis added). In reaching this decision, the House of Lords stressed that the "application to the court must raise matters of custody within the meaning of the Convention" in order for custody rights to vest in the court. App. 11c. Finding that the father's application raised these matters, the court held that "it did not

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[4] Petitioner relied upon this holding in both his written brief and at oral argument in the Court of Appeals.

regard the award of custody by consent in proceedings which were still pending and in which active consideration of an application for guardianship by the father was taking place at the time of removal as destructive of the court's power to decide the place of the child's residence." App. 13c. Accordingly, the court remained vested with this custody right.[5] Importantly, the House of Lords also addressed the issue which appeared to trouble the Court of Appeals in *Shealy*; whether a parent may petition for a child's return on behalf of a court possessing custody rights over that child. Finding such a scenario proper under the Convention, Lord Mackay of Clashfern stated:

> I see no reason in terms of the Convention or otherwise why a person who has invoked the jurisdiction of the court as a result of which the court has rights of custody in respect of a child should not be entitled to apply to the courts of the country to which the child has been wrongfully removed for the restoration of the child to the jurisdiction of his or her

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[5] Numerous other foreign courts have held that, under the Convention, a court can exercise rights of custody over a child, particularly when a court has issued an interim order: *Thomson v. Thomson*, [1994] 3 S.C.R. 551, 558 (Can.); *Re S. (Abduction: Children: Separate Representation)*, [1997] 1 F.L.R. 486 (N.Z. H.C.); *H.I. v. M.G.*, [1999] 2 I.L.R.M. 1, 34, 40 (Ir. S.C.); *B. v. B. (Abduction: Custody Rights)*, [1993] 2 All E.R. 144 (C.A.) (Eng.). Although the Court of Appeals distinguished these cases as involving iron-clad *ne exeat* clauses, it patently failed to consider or address the viability of Petitioner's September 9, 2000 application for transfer of custody rights, which occurred, notably, after the Family Court issued its "conditional" July 26, 2000 *ne exeat* order.

> habitual residence. It would seem to me an unnecessary obstacle to the smooth working of the Convention to hold otherwise. Although I have referred to a situation in which the High Court of New Zealand was represented in an English court I would think it more appropriate in most cases that the application for the restoration of the child should be made by the person whose application to the court conferred on it a right of custody rather than the court itself having to undertake that responsibility.

App. 14c-15c. Finally, in reaching this holding, it must be underscored that Lord Mackay took great pains to recognize the variety of systems of law in which the Convention's provisions would be applied. Consequently, he emphasized the importance of uniformity and need to construe the Convention, as an international treaty, in such a way that its construction in one legal system is consistent with its construction in another. App. 7c.

Nor can the Court of Appeals' decision to ignore applicable foreign case law be reconciled with a recent case from a district court in another circuit that fully appreciated the need for uniformity in interpretation of the Convention. *See Fawcett v. McRoberts*, 168 F. Supp. 2d 595 (W.D.Va. 2001). In *Fawcett*, a Scottish divorce decree mandated that the child "reside" with the father but that the mother be given "contact" rights on weekends and numerous holidays. *Id.* at 597-98. Thereafter, the father gave an "undertaking" to the sheriff court that he would not remove the child from Scotland to the United States. *Id.* at 598. Later, in the midst of court proceedings concerning physical custody and visitation rights, the father broke his word and abducted the

child, bringing him to this country. *Id.* In ruling that the father had breached rights of custody held by the sheriff court, the district court ruled that "there is no doubt that the Sheriff Court in Ayr (an "institution"), in convening proceedings concerning [the child's] custody, was an 'institution' which also possessed 'rights of custody' with respect to the care of [the child]." *Id.* at 603. Moreover, it stated that "by participating in the sheriff court proceedings and by undertaking not to remove [the child], Mr. McRoberts understood the role of the sheriff court in adjudicating the dispute between himself and his former wife, and can not now deny its interest in this case." *Id.* The *Fawcett* Court went to great lengths to exhibit deference and cite with approval the aforementioned rationale and findings of the House of Lords in *Re H.*

The same conclusion must apply here. On September 9, 2000, the Petitioner applied to the Family Court for a transfer of the domicile determination rights from the Respondent. Notably this application came several months after the Family Court's July 26, 2000 interim order containing the "conditional" *ne exeat* clause. As in *Re H.*, this application separately raised the matter of custody within the meaning of Articles 3 and 5 of the Convention because the Family Court was entrusted with the final custody determination as to where Sierra would reside. Consequently, because the removal of Sierra occurred prior to a final custody determination, Ms. Shealy's actions must be viewed as destructive of the Family Court's rights of custody, and therefore wrongful pursuant to the Convention. To hold otherwise is to thwart the whole purpose of the Convention.

Re H. and *Fawcett* are not only on all fours with the facts and the legal interpretations at issue in this case, but they also exhibit the requisite level of deference to our sister

signatories and comity. It is of paramount importance that this Court therefore re-examine the holding in *Shealy*. To allow the *Shealy* ruling to stand without examination by the Supreme Court will enormously disrupt the operation of the Convention both within the United States and around the world.

CONCLUSION

For these reasons, a writ of certiorari should be issued to review the opinion and judgment of the Court of Appeals.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 01-1365

[Filed July 8, 2002]

GREGORY S. SHEALY,
Petitioner-Appellant,

v.

REGINA E. SHEALY,
Respondent-Appellee,

On Appeal from the
United States District Court
for the District of Colorado
(D.C. No. 01-D-972)

JUDGES:
Before SEYMOUR and HENRY, Circuit Judges, and OBERDORFER,* District Judge.

* The Honorable Louis F. Oberdorfer, District Judge, United States District Court for the District of Columbia, sitting by designation.

OPINION

SEYMOUR, Circuit Judge.

This case concerns whether Sierra Shealy, daughter of Mr. Gregory Shealy and Sgt. Regina Shealy, should be returned to Germany from the United States pursuant to the Hague Convention on the Civil Aspects of International Child Abduction, *opened for signature* Oct. 25, 1980, T.I.A.S. 11,670; *instrument of U.S. ratification deposited* April 29, 1988, S.Treaty Doc. No. 99-11, reprinted in *19 I.L.M. 1501 (1980)* (hereinafter Hague Convention or Convention). The German court, where the parties are engaged in a custody dispute over Sierra, found that her removal to the United States by Sgt. Shealy did not violate the terms of that court's interim custody order. The district court in the instant action, in ruling on Mr. Shealy's Hague Convention claim, determined Sgt. Shealy's removal of Sierra was not wrongful. For the reasons set out below, we affirm.

I

Mr. Shealy and Sgt. Shealy are United States citizens who were married in the United States. Their only child, Sierra Hope Shealy, was born in the United States on May 22, 1996. The following year Sgt. Shealy, a dental technician in the U.S. Army, was assigned to a three-year tour in Germany. Sgt. Shealy's family accompanied her to Germany pursuant to a command sponsorship, whereby the Army allows the family of personnel to accompany soldiers abroad and use Army facilities contingent upon the service member's continued presence in the country. Sierra and her parents lived on the Army base in Germany for approximately three

and a half years prior to the events around which this appeal revolves.

While living in Germany, the couple's marriage fell apart. Sgt. Shealy began divorce proceedings in German family court and sought sole custody of Sierra. Mr. Shealy, also submitting to the jurisdiction of the German courts, filed for domicile determination rights and custody of Sierra. The German family court issued a decision on July 26, 2000, temporarily granting domicile determination rights to Sgt. Shealy. Aplt. App. at 466-69.[1] The decision included a non-removal (or *ne exeat*) clause barring Sgt. Shealy from taking the child out of Germany without her father's consent, "unless this should become necessary for military reasons." *Id.* at 466.

On February 14, 2001, the family court ordered that an opinion be obtained from a court-appointed social worker in an effort to determine which parent should have custody. Sgt. Shealy and Sierra were scheduled to meet with a social worker for an interview the following month. One week after the family court order, Sgt. Shealy requested curtailment of her German assignment, admittedly in order to avoid the jurisdiction and decision of the German family court. On March 14, the Army authorized Sgt. Shealy to report to her new post at Ft. Collins, Colorado. Five days after receiving her orders, and one day prior to their appointment with the social worker, Sgt. Shealy removed Sierra from Germany and brought her to the United States. She notified neither Mr.

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[1] Certified translations were provided by the parties and citations are to those translations rather than the original court decisions.

Shealy nor the family court prior to carrying out her actions. She also dismissed her German divorce proceeding and subsequently filed for divorce in Alabama.

Shortly after Sgt. Shealy's removal of Sierra, the German family court issued a ruling declaring that the removal constituted a violation of Mr. Shealy's custody rights. *Id.* at 475. The court's holding was based on its view that unilateral removal of the child was not necessary for military reasons as required by its prior order. The necessity would not occur, it held, until the "drop-dead" return date set by the military, which the court understood to be sometime in April.[2] *Id.*

Sgt. Shealy appealed the family court ruling to the regional court. That court annulled the family court ruling on June 19, 2001, holding that the transfer *was* necessary for military reasons.

> It is true that she moved the child to the United States somewhat earlier than *absolutely* necessary. At the present time it can no longer be assumed that she arranged the child's residence in the US illegally, since she will have to be in the United States anyway for military reasons as of the end of July 2001.

Id. at 480-81 (emphasis added). Although Sierra is no longer

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[2] In fact, Sgt. Shealy's orders set a final report date of July 31, 2002. Aplt. App. at 486.

in Germany, the custody proceeding remains open pending the return of Sierra to Germany.

While Mr. Shealy's complaint regarding Sgt. Shealy's removal of Sierra was pending in the German courts, he filed an emergency petition in federal court in Colorado, asserting the removal violated the German family court's order and Mr. Shealy's custody rights under the German Civil Code. The petition sought an order returning Sierra to her "habitual residence" in Germany under the Hague Convention, to which the United States is a signatory, and the International Child Abduction Remedies Act (ICARA), 42 U.S.C. §§ 11601 to 11610, this country's legislation implementing the Convention.

Relying on decisions from other circuits, the district court found that Sierra was a habitual resident of Germany. Aplt. App. at 330-31 (*citing Miller v. Miller*, 240 F.3d 392, 400 (4th Cir. 2001); *Shalit v. Coppe*, 182 F.3d 1124, 1128 n.5 (9th Cir. 1999); *Feder v. Evans-Feder*, 63 F.3d 217, 224 (3rd Cir. 1995); *Friedrich v. Friedrich*, 983 F.2d 1396, 1401 (6th Cir. 1993) (*Friedrich I*)). Citing German law, the court found that because the family court order of July 26, 2000, was a temporary ruling giving Sgt. Shealy no more than domicile determination rights, Mr. Shealy retained joint custody rights that he was exercising with respect to his daughter. Aplt. App. at 332. However, the district court found that Sgt. Shealy's removal of Sierra was not wrongful because it did not breach Mr. Shealy's custody rights under German law. The non-removal clause contained in the German family court's July 26, 2000 order allowed for removal of the child if a military necessity existed. The district court, although troubled by the timing of Sgt. Shealy's

departure from Germany, found a military necessity existed at the time Sgt. Shealy removed Sierra to the United States. In this respect, the court relied upon testimony from the chief of personnel reassignments at Ft. Carson regarding the nature of military reassignment orders, and Sgt. Shealy's testimony regarding her understanding of the German family court's order. Most importantly, the court based its decision on the findings of the German appellate court that Sgt. Shealy's departure with Sierra was necessary for military reasons. *Id.* at 336.

On appeal, Mr. Shealy challenges the district court's order on two grounds. First, he contends the court erred in concluding that Sierra's removal was not "wrongful" because it was justified by military necessity. Second, he asserts the right to determine the child's residence vested the German family court with a right of custody over the child and therefore the German court's rights were violated by Sgt. Shealy's removal of Sierra from Germany.

II

Our decision in this case is governed by the Hague Convention and the International Child Abduction Remedies Act. In an action pursuant to ICARA and the Hague Convention, we review the district court's findings of fact for clear error and its conclusions regarding principles of domestic, foreign, and international law *de novo*. *See Miller*, 240 F.3d at 399 (citing *Friedrich v. Friedrich*, 78 F.3d 1060, 1064 (6th Cir. 1996)(*Friedrich II*)).

The Convention and ICARA serve, in part, to prevent

parents from abducting children in order to avoid the jurisdiction of courts with whose rulings they do not (or believe they will not) agree. The treaty and legislation seek to "preserve the status quo and to deter parents from crossing international boundaries in search of a more sympathetic court." *Friedrich I*, 983 F.2d at 1400; *see also* Karin Wolfe, *A Tale of Two States: Successes and Failures of the 1980 Hague Convention on the Civil Aspects of International Child Abduction in the United States and Germany*, 33 N.Y.U.J. OF INT'L L. & POL. 285, 299 (2000) (The convention "is intended as a rapid remedy for the left-behind parent to return to the status quo before the wrongful removal or retention."). Our scope of inquiry under the Hague Convention "is limited to the merits of the abduction claim." *Miller*, 240 F.3d at 398 (citing ICARA, 42 U.S.C. § 11601(b)(4)). As such, the merits of the underlying dispute related to custody of Sierra are not before us. *Id.*

In a case arising under ICARA and the Hague Convention, the district court must determine whether the removal of a child was "wrongful" under the definition set forth in the Convention. The removal or retention of a child is wrongful where "it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention," where such rights were actually exercised by the parent seeking return of the child. Hague Convention, art. 3. The petitioner bears the burden of showing by a preponderance of the evidence that the removal or retention was wrongful. 42 U.S.C. § 11603(e)(1)(A); *see Feder*, 63 F.3d at 222. More specifically, the petitioner must show that: (1) the child was habitually resident in a given state at the

time of the removal or retention; (2) the removal or retention was in breach of petitioner's custody rights under the laws of that state; and (3) petitioner was exercising those rights at the time of removal or retention. *See Miller*, 240 F.3d at 398 (citing the Hague Convention, art. 3).

A

In the case before us, the district court determined that Sierra Shealy was habitually resident in Germany at the time Sgt. Shealy removed her to the United States. Sgt. Shealy has not appealed that determination. Nor do the parties dispute that Mr. Shealy was exercising custody rights prior to the time Sgt. Shealy removed Sierra to the United States. The key issue raised by Mr. Shealy's appeal is thus whether the district court erred in determining Sgt. Shealy's removal of Sierra to the United States was not in breach of Mr. Shealy's custody rights under German law, and thus not wrongful under the terms of the Hague Convention and ICARA.[3]

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[3] Mr. Shealy also maintains the interim order vested the German courts with rights of custody under the convention and that these rights were breached when Sgt. Shealy removed Sierra from Germany. We need not determine whether Mr. Shealy may seek return of Sierra by making a wrongful removal claim based on the violation of the custody rights of a party other than himself. Even assuming Mr. Shealy were able to petition on behalf of the German court, his claim would fail. Because the German court determined a military necessity did in fact exist, any rights the court arguably had relevant to Article 3(a) of the Convention were not violated by Sgt. Shealy's removal of Sierra to the United States and the removal was thus not wrongful.

In his brief on appeal, Mr. Shealy relies heavily upon cases in this and other countries where custody orders included *ne exeat* clauses barring parents from removing a child to another country without permission. *See Croll v. Croll*, 229 F.3d 133 (2d Cir. 2000), *cert. denied*, 151 L. Ed. 2d 258, 122 S. Ct. 342 (2001); *In re F* [1995] Fam. 224, 229-30 (C.A.) (Eng.) (quoting *In re B* [1994] 2 F.L.R. 249, 260 (C.A.) (Eng.)); *Thomson v. Thomson*, [1994] 119 D.L.R. (4th) 253, *274* (Can.); *B. v. B.* [1993] Fam. 32, 38 (C.A.) (Eng.); *C. v. C.* [1989] 1 W.L.R. 654, 658 (C.A.) (Eng.). This case differs from that authority for a key reason: the interim German family court decision permitted Sgt. Shealy to remove Sierra *without* Mr. Shealy's permission if "this should become necessary for military reasons." Aplt. App. at 466. If a military necessity did exist, then there was no violation of the *ne exeat* order or, accordingly, of Mr. Shealy's custody rights under German law.

The only question for us to determine, then, is whether the district court erred in finding a military necessity did in fact exist. Mr. Shealy challenges the district court's determination regarding military necessity. He contends that instead of a military necessity, Sgt. Shealy "intentionally, knowingly and *voluntarily*" manipulated the U.S. Army to obtain an immediate and early curtailment of her military duties in Germany. Aplt. Br. at 22. In essence, he maintains that to the extent a military necessity existed, it was created by Sgt. Shealy to defeat the intent of the German court order. In the district court, Mr. Shealy bore the burden of establishing, by a preponderance of the evidence, that Sierra's removal was wrongful. 42 U.S.C. § 11603(e)(1)(A). Whether or not a military necessity existed is a finding of fact that we review for clear error. *Miller*, 240 F.3d at 399.

The district court's findings regarding "military necessity" relied upon expert testimony on military reassignments. The expert testified that when a soldier gets reassignment orders, it becomes a military necessity for them to report once those orders are issued. This is especially so when the orders authorize early report to the new assignment. While Sgt. Shealy was not *required* to report until July 31, 2001, soldiers are "encouraged to and generally have to" report early in order to complete all of the tasks required to settle in the new post. The district court also relied upon Sgt. Shealy's own testimony that she understood she needed to report to Fort Carson as quickly as possible. Finally, the court relied upon the June 19, 2001 ruling by the German regional court that Sgt. Shealy's removal of Sierra was justified by military necessity and that the removal was not unlawful under German law.

Like the district court, we are concerned by Sgt. Shealy's actions in removing Sierra from Germany. Evidence presented to the district court demonstrates the extent to which Sgt. Shealy helped manufacture the necessity. In her request for curtailment of her assignment, she plainly states that she wished to avoid what she predicted would be a court decision granting custody of Sierra to Mr. Shealy. Aplt. App. at 484-485. Because of her circumstances as a member of the armed forces, Sgt. Shealy was able to manipulate the system and accomplish what the Hague Convention was created to prevent: a parent removing a child from a country in order to avoid the jurisdiction of local courts. Nonetheless, we are unable to conclude the district court erred in finding as it did. There is ample evidence to support the court's finding that a military necessity did in fact exist and its conclusion that Mr. Shealy did not carry his burden to prove the removal was

wrongful. Suffice it to say here that once the military order issued, there was a military necessity within the meaning of the German family court's interim order. The military's reason for issuing the order is irrelevant. Like the district court, we are most persuaded by the German regional court's ruling because it interpreted the law of Germany. The regional court held that the transfer orders made the removal a military necessity and was thus an acceptable ground for removal pursuant to the terms of the family court's July 6, 2000 order. We decline to second guess the German court under these circumstances. The district court's determination is not clearly erroneous.

III

Mr. Shealy contests the district court's ruling on another ground, contending it misinterpreted the Convention by resting its decision on the interim custody ruling of the German court that awarded the right to determine residence to Sgt. Shealy. Mr. Shealy argues the district court erred in finding that a *temporary* or interim order pertaining to domicile determination could legitimize an action by Sgt. Shealy that violated the joint custody rights he retained under German law. Aplt. Br. at 19.

The Convention is very clear that the law of the country in which the child was habitually resident governs decisions as to whether custody rights existed at the time of removal. German law gives both parents equal *de jure* custody of a child, custody which continues with few exceptions until a competent court says otherwise. *See Friedrich II*, 78 F.3d at 1064 (citing German Civil Code 1621(1)). Mr. Shealy maintains that the July 6, 2000 ruling

giving Sgt. Shealy the right to determine residence did not constitute a ruling on the full range of custody rights such that it would alter joint custody under the German Civil Code. Relying on a treatise on the Convention, Mr. Shealy suggests that interim decisions cannot be used to justify a child's removal. "'Were temporary orders of this type to be included [under Article 3(2)], a parent could be deprived of the Convention remedy without the merits of the custody issue having been fully investigated.'" Aplt. Br. at 19-20 (quoting PAUL R. BEAUMONT & PETER E. MCELEAVY, THE HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION 51 (1999)). Yet, immediately following the passage quoted by Mr. Shealy, the treatise concludes, "Therefore, *unless an express declaration is made to the contrary,* it is submitted that a provisional award of sole custody should not be recognized as allowing a parent to remove a child to. . . a foreign jurisdiction." BEAUMONT & MCELEAVY at 51-52.

Mr. Shealy is correct that the German courts have not yet made a final determination on the custody of Sierra. Our opinion here does not in any way preempt or replace any final custody decision over which the German court may have retained jurisdiction. For our purposes in determining the Hague Convention claim, however, the interim decision of the German court is dispositive. While that decision did not rule on the full bundle of custody rights Mr. Shealy may have under German law, it is determinative in our decision as to whether Sgt. Shealy's action represented a wrongful removal. The interim decision delineated the status quo in the period between the instigation of the action and a final determination by the court. In many ways it served the same purpose as an injunction, setting terms for all parties to follow while

awaiting final judgment in the action. It thus granted Sgt. Shealy the right to remove Sierra from Germany should military necessity require. While the ruling was temporary, it nevertheless delineated the rights of both parents in the period between the filing of the complaint and a final decision by the court.

We **AFFIRM** the judgment of the district court.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 01-D-972

[Filed August 6, 2001]

GREGORY S. SHEALY,	)
Petitioner,	)
	)
v.	)
	)
REGINA E. SHEALY, et al.,	)
Respondents.	)
	)

ORDER

I. INTRODUCTION

THIS MATTER is before the Court on Petitioner's Amended Emergency Petition for Return of Child to Petitioner filed June 1, 2001. The Petition arises under the Convention on the Civil Aspects of International Child Abduction done at the Hague on October 25, 1980 ("the Hague Convention"), which is attached as Exhibit A to the Petition, and the International Child Abduction Remedies Act, 42 U.S.C. § 11601 *et seq*. The Hague Convention was ratified between the United States and Germany, the two

countries at issue in this case, and is in full force and effect in the United States.

Petitioner alleges that his daughter, Sierra Hope Shealy ("Sierra"), was wrongfully removed from her habitual residence of Germany by her mother, Regina E. Shealy, in violation of his custody rights. Petitioner seeks the prompt return of his daughter to Germany where Petitioner is living. This Court has jurisdiction to hear the dispute at issue pursuant to 42 U.S.C. § 11603.

An evidentiary hearing was held on the Amended Emergency Petition on July 23, 2001. For the reasons stated at the hearing and in this Order, the Amended Emergency Petition for Return of Child to Petitioner filed June 1, 2001, is DENIED, and the Clerk of Court is directed to enter judgment in favor of Respondents Regina Shealy and Nicole Demchak and against Petitioner Gregory S. Shealy.[1]

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[1] Although Nicole Demchak was named as a Respondent by Petitioner, she never entered an appearance in this case and it is unclear whether she was even served. Further, Petitioner presented no argument or evidence that Ms. Demchak was involved in the removal of Sierra Shealy from Germany. Thus, even if the relief sought in the Petition were not denied by the Court, dismissal of Ms. Demchak would appear to be warranted. Accordingly, the Court limits its discussion to the events that occurred between Petitioner and Respondent Regina E. Shealy.

II. FACTUAL BACKGROUND

Both Petitioner, the father of Sierra (referred to as "Mr. Shealy" or "Petitioner") and Respondent Regina E. Shealy (referred to as "Mrs. Shealy"), are United States citizens who were married in the United States. They had one child, Sierra, who was born in the United States on May 22, 1996. Sometime in 1997, Mrs. Shealy received orders issued by the United States Department of the Army to go to Germany. Mrs. Shealy arranged for Mr. Shealy and Sierra to accompany her to Germany pursuant to a command sponsorship whereby the Army allows the family of army personnel to accompany them to that location and to use the army facilities. Sierra and her parents lived in Germany on an army base for approximately 3 ½ years prior to Sierra's removal from Germany.

While living in Germany, Mrs. Shealy commenced divorce proceedings and sought the sole custody of Sierra. Mr. Shealy also filed for domicile determination rights and may also have requested custody. Judge Konig of the Local Family Court in Ider-Oberstein issued a decision on July 26, 2000, that stated, "[t]he application for a transfer of parental custody [by Mrs. Shealy] is not sustained." Exhibit 1.[2] Further, the decision awarded temporary and interim "domicile-determination rights" regarding Sierra to Mrs. Shealy under specified circumstances. *Id.* Specifically, Mrs Shealy was forbidden from removing Sierra from Germany

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[2] It appears that this decision was made because Mrs. Shealy agreed to withdraw her request for sole custody.

"against the will of the father unless this should become necessary for military reasons." *Id.*[3]

It is undisputed that this decision of the Local Family Court was a temporary decision and that a final custody ruling and ruling as to domicile determination rights would be made by the German court at a later time. Mr and Mrs. Shealy then entered into a subsequent temporary agreement giving Mr. Shealy rights to have Sierra stay with him every second weekend and to pick Sierra up daily from kindergarten and keep her from 12:00 p.m. to 5:30 p.m. *Id.*

On March 20, 2001, Sierra and Mrs. Shealy were scheduled to meet with a social worker to assist the judge in making a final ruling on custody. On March 19, 2001, without notice to Mr. Shealy or the social worker, Mrs. Shealy removed Sierra from Germany and brought her to the United States. This removal of Sierra from Germany occurred after Mrs. Shealy had received reassignment orders dated March 14, 2001, that gave her until July 31, 2001, to report to her new assignment at Fort Carson, Colorado. Exhibit B. The reassignment orders stated that movement of Mrs. Shealy's family members is authorized and included return orders to the United States for both Sierra and Mr. Shealy. *Id.*

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[3] The Decision also said on a different page that "the mother does not have the right to take the child out of Germany [against] the will of her father unless she is forced to do so for military reasons." *Id.* Finally, another translation was attached to the Complaint as Exhibit E which stated that Mrs Shealy "will not be able to take the child from...Germany without the father's consent, unless Military Orders make a removal necessary."

It appears that the reassignment orders came about due to Mrs. Shealy's request on February 21, 2001, for an early curtailment of her German assignment. Exhibit 12. This request referenced the fact that Mrs. Shealy did not want the German Court to make a custody decision as to her daughter. *Id.*

Prior to leaving Germany, Mrs. Shealy withdrew her divorce petition in that country and thereafter filed divorce proceedings in Alabama. The custody proceedings in Germany are still pending but have not been finalized as a result of Sierra's removal from Germany.

Petitioner asserts that Sierra has been wrongfully removed from Germany since Mrs. Shealy violated both the Local Family Court's Order and Mr. Shealy's parental rights to custody pursuant to the German Civil Code, provided as Exhibits 9 and 10. Mr. Shealy further asserts that he has been given no contact with Sierra since she was wrongfully removed from Germany. Mrs. Shealy contends that she lawfully removed Sierra from Germany under military orders, and that her removal of Sierra was thus not wrongful within the meaning of the Convention.

II. ANALYSIS

The Hague Convention asserts that the removal or the retention of a child is to be considered wrongful when (a) "it is in breach of rights of custody attributed to a person ... either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention"; and (b) "at the time of removal or retention those rights were actually exercised, either jointly or alone,

or would have been so exercised but for the removal or retention". *Id.*, Article 3. The petitioner bears the burden of showing by a preponderance of the evidence that the removal or retention was wrongful. 42 U.S.C. § 11603(e)(1)(A); *Feder v. Evans-Feder*, 63 F.3d 217, 222 (3rd Cir. 1995).

If the above requirements are established and less than a year has elapsed since the wrongful removal, the court "shall order the return of the child forthwith" (Art. 12) unless certain exceptions under Art. 13 and 20 can be established by the respondent. 42 U.S.C. § 11603(e)(2). These exceptions include that: "the person requesting return was not at the time of the retention or removal, actually exercising custody rights or had consented to or subsequently acquiesced in the removal or retention...; (2) the return of the child would result in grave risk of physical or psychological harm to the child...; 3) the return of the child would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms...; or 4) the proceeding was commenced more than one year after the abduction and the child has become settled in the new environment .... ". *Ohlander v. Larson*, 114 F.3d 1531, 1534 (10th Cir. 1997), *cert. denied*, 522 U.S. 1052 (1998); 42 U.S.C. § 11603(e)(2).

In this case, Mrs. Shealy does not rely on any exceptions to the Hague Convention; instead, she argues only that the removal of Sierra under military orders was not wrongful within the meaning of the Hague Convention. I first must address whether Sierra was a habitual resident of Germany at the time of her removal from that country. The term "habitual resident" is not defined in the Hague Convention or the International Child Abduction Remedies

Act. As a consequence, courts have held that the facts and circumstances of each case must be assessed. *See In Re Prevot*, 59 F.3d 556, 560 (6th Cir. 1995), *cert. denied*, 516 U.S. 1161 (1996). "'The intent is for the concept...to remain fluid and fact based, without becoming rigid.'" *Id.* (quotation omitted).

The Third Circuit in *Feder v. Evans-Feder*, 63 F.3d 217, 224 (3rd Cir.1995) defined habitual resident as "the place where [the child] has been physically present for an amount of time sufficient for acclimatization and which has a 'degree of settled purpose' from the child's perspective." The Third Circuit also held that "a determination of whether any particular place satisfies this standard must focus on the child and consists of an analysis of the child's circumstances in that place and the parents' present, shared intentions regarding their child's presence there." *Id.* The Fourth Circuit in *Miller v. Miller*, 240 F.3d 392,400 (4th Cir. 2001) stated that it was guided by its sister circuits in concluding that "'there is no real distinction between ordinary residence and habitual residence" (quotations omitted). The Sixth Circuit in *Friedrich v. Friedrich*, 983 F.2d 1396, 1401 (6th Cir. 1993) held that "habitual residence must not be confused with domicile" and that "[o]n its face, habitual residence pertains to customary residence prior to the removal." *Id.* at 1401.

I find that Sierra's habitual residence at the time of her removal was Germany. At the time of her removal, Sierra had lived in Germany for 3 ½ years out of her four years and ten month life span, was attending kindergarten in a local German town outside the army base, and had made friends and generally acclimatized to living in Germany. Although Sierra lived on the army base, the evidence shows that the family

would venture into the German community in which they lived and that Mr. Shealy further exposed Sierra to German culture after he moved out of the family's residence on the army base and into a local German town. I thus find that Sierra's ordinary residence was in Germany, not in the United States. *See Shalit v. Coppe*, 182 F.3d 1124, 1128 n. 5 (9th Cir. 1999); *Feder*, 63 F.3d at 224; *Friedrich*, 983 F.2d at 1401-02; *March v. Levine*, 136 F. Supp. 2d 831,838-40 (M.D. Tenn. 2000), *aff'd*, 249 F.3d 462 (6th Cir. 2001); *In Re Nicholson*, No. 97-1273-JTM, 1997 WL 446432 (D. Kan. 1997); *Harkness v. Harkness*, 577 N.W.2d 116, 121-123 (Mich. App. 1998).

Mrs. Shealy argues that Sierra's habitual residence should not be Germany because she was an American citizen living on an American army base in Germany and that the army base was, in effect, an American enclave in Germany. Mrs. Shealy points to the fact that English was spoken at the army base, that only Americans were allowed on the base, that the activities on the base were all American in nature, and that even the radio and television stations were in English. I don't find these arguments persuasive.

The Sixth Circuit in *Friedrich* rejected similar arguments by Mrs. Friedrich that her son should be a habitual resident of the United States despite having lived almost exclusively in Germany because he had United States citizenship and because Mrs. Friedrich intended to return to the United States when she was discharged from the military. *Id.* at 1401. Further, the court in *Friedrich* recognized that "a United States military base is not sovereign territory of the United States." *Id.* at 1401. "The military base... is on land which belongs to Germany and which the United States

Armed Services occupy only at the pleasure of the German government. *Id.*

I next consider whether Petitioner had custody rights with respect to Sierra and whether he was actually exercising those custody rights. I find that Petitioner did have custody rights under German law with respect to Sierra. Under German law, both parents retain joint rights of custody until a decree has been entered limiting one parent's rights. *See* Exhibits 9 and 10 (Certification of German Civil Code); *see also Friedrich v. Friedrich*, 78 F.3d 1060, 1064 (6th Cir. 1996); *Currier v. Currier*, 845 F. Supp. 916, 921 (D. N.H. 1994); *Harkness*, 577 N.W.2d at 121. The temporary German order giving Mrs. Shealy domicile determination rights with respect to Sierra does not change this result since it denied Mrs. Shealy's request for sole custody and was not a final custody ruling. Further, I find that Petitioner was actually exercising his custody rights, since he was actively seeing Sierra while she was in Germany by picking her daily up from kindergarten and spending time with her every other weekend.

Notwithstanding the above findings, I must find under the particular facts of this case that the removal of Sierra from Germany by Mrs. Shealy was not wrongful because it was not in breach of Petitioner's custody rights. This is a unique case where Mrs. Shealy was in Germany pursuant to military orders and her family was allowed to accompany her to Germany under a command sponsorship. The evidence at the hearing showed that under a command sponsorship, the family of army personnel must leave the country when the army personnel is assigned to leave, since they only have the right to live in that country during the time frame that their

family member is assigned there. The Local German Family Court impliedly recognized this in its temporary order, finding that Mrs. Shealy had the right to remove Sierra from Germany "against the will of the father [if it] should become necessary for military reasons."[4]

Although Mr. Shealy acknowledges that Mrs. Shealy did have military orders to report to Fort Carson, Colorado on July 31, 2001, he asserts that it was not necessary to bring Sierra to the United States when she did under these orders because Mrs. Shealy reported to Fort Carson only recently, sometime in May of 2001. In that regard, he asserts that Mrs. Shealy left Germany on March 19, 2001, not pursuant to leave due to a permanent change of station ("PCS leave"), but merely on annual leave. Exhibit 17. Further, Mrs. Shealy returned to Germany without Sierra on March 30, 2001, and commenced her outprocessing at the army base at that time. This outprocessing was not completed until April 25, 2001, after which Mrs. Shealy returned to the United States. Mr. Shealy argues that Sierra could have stayed with Mrs. Shealy in Germany during the outprocessing, and that the timing of Mrs. Shealy's removal of Sierra from Germany the day before she was supposed to meet with a social worker and just a few weeks before the judge was supposed to make a custody decision shows that the removal was wrongful.

I do find troubling the timing of Mrs. Shealy's department from Germany. Nevertheless, the evidence presented at the hearing convinces me that the reassignment orders dated March 14, 2001, made it a military necessity for

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[4] Again, as stated earlier, there are other translations.

Mrs. Shealy to leave Germany at any time after these orders were issued, including on March 19, 2001, when Mrs. Shealy removed Sierra from Germany.

Mrs. Shealy presented the testimony of Susan Shea, the chief of personnel reassignments at Fort Carson, who was certified as an expert regarding military reassignments. Ms. Shea testified that a soldier's orders are normally signed 90-120 days before the new assignment to give the soldiers time to complete their outprocessing requirements at the old post and their inprocessing requirements at the new post. She further testified that when a soldier gets orders, it becomes a military necessity for them to report when the orders are issued, since the Army has decided that soldier is needed in a particular post. Further, once the orders are issued, it becomes the soldier's primary role in life to get themselves prepared to leave their present post and report to the new post, and the commander has to allow the solder time to take care of these duties.

As to the reassignment orders of Mrs. Shealy which stated, "early report authorized", Ms. Shea testified that this means that the new post needs her services and that the soldier is encouraged to report as early as possible. In other words, the reporting date of July 31, 2001, is a "drop-dead date" to return, but that soldiers are encouraged to and generally have to report early in order to complete all of the inprocessing tasks that are required at the new post, particularly when the orders say, "early report authorized". Finally, Ms. Shea testified that it was not uncommon for soldiers to take leave after they have received reassignment orders and to return, to this country to try to get things in

order, and that it was permissible for the soldiers to bring their children with them.

Mrs. Shealy also testified on this issue, and stated that her understanding of the Local Family Court's ruling in Germany was that military necessity meant that she could leave if she had orders to return to the United States. Further, she testified that the reassignment orders mean that a soldier needs to clear his or her present assignment as quickly as possible and get to the new position to begin inprocessing. As to her specific assignment, Mrs. Shealy testified that she understood that she needed to report to Fort Carson as quickly as possible because there was a shortage of personnel. Mrs. Shealy also testified that she brought Sierra back to the United States prior to the commencement of outprocessing in Germany so that Sierra would not have to moved from place to place in terms of living arrangements and would not have to accompany her to all the appointments required for outprocessing.

Finally, my ruling is supported by findings of the German Court, which is the applicable law I must look to in determining whether Petitioner's custody rights have been breached since Sierra is a habitual resident of that country. *See* Hague Convention, Article 3. First, one translation of the Local German Family Court's Order of July 26, 2000, attached as Exhibit E to the Complaint, stated that Mrs. Shealy "will not be able to take the child from... Germany without the father's consent, unless *Military Orders make a removal necessary*." (emphasis added). For the reasons discussed above, I find that military orders did make Sierra's removal necessary.

Second, the German Local Family Court issued a decision on March 27, 2001, that Mr. Shealy's parental custody rights were unlawfully violated by Mrs. Shealy's removal of Sierra from Germany and that "a [military] necessity does not occur until the return date set by the military". Exhibit 3. However, this ruling was reversed by the German Regional Appeals Court in Koblenz by decision dated June 19, 2001. Exhibit Q. The German Regional Appeals Court referenced the actual reassignment orders of Mrs. Shealy (it does not appear that the Local Family Court had these orders when it issued its decision) and found as follows:

> The petitioner's complaint in question has been formally considered. The petitioner submitted transfer orders. According to these documents, she will be transferred to the USA no later than July 31,2001. According to the court's decision dated 07/26/00, she does not have the right to move both party's child outside of the Federal Republic of Germany, against the father's will; unless, this is based on military reasons .... However, it was necessary to do so for military reasons. Even though she moved the child back to the United States earlier than required. However, when considering this case from the present point of view, one must realize that the mother did not unlawfully remove the child. She was going to

> move to the USA by the end of July 2001 anyway.

Id.[5]

Accordingly, the decision of the Local Family Court that Mr. Shealy's parental custody rights were violated was overruled by the German Appellate Court. Further, since German law controls this issue, I must accept the German Court's ruling that Mrs. Shealy did not unlawfully remove Sierra from Germany, a ruling I agree with based on the testimony presented at the hearing.[6]

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[5] The Petitioner's translation of this Order was slightly different but the Petitioner agreed at the hearing to Respondent's translation.

[6] I do not find the English Case relied on by Petitioner, *In Re F*, 1995 Fam. 224 (Court of Appeal), to be controlling. That case involved a decision by a mother who had temporary orders from a Colorado state court granting her care and control over the child to remove the child to the United Kingdom. The mother argued there that the removal was not wrongful since there was no order prohibiting her from removing the child from that jurisdiction. The English Court disagreed, holding that was irrelevant to the decision as to whether the removal was wrongful, and held that the removal was wrongful because it frustrated the father's equal and separate rights of custody. This case, however, does not involve a voluntary decision by the mother to remove the child from the country but a situation where the mother was acting on military orders that required her to leave the country and report to a new post in this country.

In conclusion, it is

ORDERED that Petitioner's Amended Emergency Petition for Return of Child to Petitioner filed June 1, 2001, is DENIED. Accordingly, it is

FURTHER ORDERED that the Clerk of Court is directed to enter judgment in favor of Respondents and against the Petitioner, each party to bear their own costs and fees. Finally, it is

ORDERED that Respondent's Motion for Summary Judgment Without a Hearing filed July 13, 2001, is DENIED AS MOOT.

DATED this 6th day of August, 2001, NUNC PRO TUNC to July 23, 2001.

BY THE COURT:

_____

Wiley Y. Daniel
U.S. District Court Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 01-D-972

CERTIFICATE OF MAILING

I hereby certify that a copy of the above Order was mailed to the following on August 6, 2001:

Richard J. Nough
301 S. Weber Street
Colorado Springs, CO 80903

Murray Ogborn
David Laird
Obgorn, Summerlin & Ogborn, L.L.C.
1120 Lincoln Street
Suite 1100
Denver, CO 80203

Stephen J. Cullen
Jamison G. White
Miles & Stockbridge, P.C.
10 Light Street
Baltimore, Maryland 21202

/s/_____
Secretary/Deputy Clerk

APPENDIX C

No. [2000] 2 All ER 1

[February 3, 2000]

25 November 1999.The Appeal Committee of the House of Lords gave permission to appeal.

Appeal

The mother appealed from the decision of the Court of Appeal (Morritt, Thorpe and Chadwick LJJ) allowing the father's appeal from the decision of Hughes J refusing the father's application seeking an order for the return of his son to Ireland pursuant to the provisions of the Hague Convention on the Civil Aspects of International Child Abduction, as implemented by the Child Abduction and Custody Act 1985, after the mother took the child from the Republic of Ireland to live in England without the consent or knowledge of the father. The House of Lords dismissed the appeal with reasons to be given later. The facts are set out in the opinion of Lord Nicholls of Birkenhead.

JUDGMENT-READ:
14 December 1999. Their Lordships dismissed the appeal for reasons to be given later. 3 February 2000. The following opinions were delivered.

JUDGMENT-1:
LORD NICHOLLS OF BIRKENHEAD. My Lords, this appeal was dismissed by the House on 14 December 1999, for reasons to be given later. I have now had the advantage of reading in draft the speech of my noble and learned friend Lord Mackay of Clashfern. I agree with the reasons he gives for dismissing this appeal.

JUDGMENT-2:
LORD MACKAY OF CLASHFERN. My Lords, this appeal concerns a female child called 'H' who was born on 3 April 1992 in the Republic of Ireland. The appellant is the mother of that child and the respondent is her father. The parties both come from the Republic of Ireland and at the time of the birth of H they were living together there but they never married and they separated in about 1995. After the separation of the parties the respondent had contact with H with the agreement of the appellant but that contact was irregular, albeit that it included staying contact on a few occasions. There is an unresolved factual dispute as to the reason why that contact was irregular. The problems concerning contact resulted in the respondent initiating proceedings under the Guardianship of Infants Act 1964 (1964, No 7) in the District Court of Carrigaline in the Republic of Ireland in respect of his daughter on 14 March 1996. On 11 April 1996 the District Court, by consent, made a custody order in favour of the appellant and made what was expressed to be an interim order until 10 October 1996 granting the respondent access to his daughter every Sunday from 2.00 pm to 6.00 pm; access to be in the mother's dwelling-house with walks in the neighbourhood, with liberty to re-enter by which is meant liberty to apply. Between about May 1996 and May 1997 the

respondent was in prison serving a sentence in respect of drugs offences and did not exercise the right of access conferred by the order of 11 April 1996.

After his release from prison there was sporadic access between him and the child and on about 30 March 1998 the father filed an application in the District Court of Carragaline. The application was made in a pro forma document headed Guardianship of Infants Act 1964 Notice of Application under section 11(1) 11(4) for the Court's Direction' and containing the pre-printed words 'For the court's direction regarding the custody of the infant and the right of access thereto of the applicant' following which the respondent's Irish solicitors had added the words 'To wit Guardianship and access'. In the present proceedings the evidence filed by the respondent has made it clear that the relief he sought from the district court was in reality to be appointed a guardian of the child and an order specifying the access that he should have to that child, and, indeed, those were the forms of relief eventually granted to him. The respondent's application of 30 March 1998 first came before the district court on 14 May 1998. Both parties and their lawyers were in attendance and the matter was adjourned, by consent, to 23 July 1998, the parties having reached an agreement that there should be access between the respondent and his daughter during the daytime on each Saturday and Sunday in the meantime. No order appears to have been drawn to reflect this state of affairs, but access took place in accordance with the agreement of the parties until 20 June 1998 when the respondent found the appellant's house to be empty when he attended for an access visit. He was told by the neighbours that the appellant was leaving Ireland, he found the child staying with a friend of the appellant and he

reported to the Gardai and to his lawyers his fear that the appellant would remove the child from Ireland. The appellant was in fact in England looking for accommodation between 18 and 21 June 1998. On 23 June 1998 the appellant left the Republic of Ireland without the knowledge or consent of the respondent and came to live in England with her two children H and another child born of a different relationship. The respondent believed that the appellant and children were in either the Liverpool or Manchester area, but he had not been informed of their address and there was no direct communication between the parties until May 1999 when such communication was re-established through the good offices of the father of the appellant's other child. In the meantime on 23 July 1998 the District Court of Carrigaline had proceeded to hear the respondent's application, in the absence of the appellant, and had made orders appointing the respondent a guardian of his daughter and granting him access to that child from 10.00 am each Saturday until 6.00 pm each Sunday. The order of 23 July 1998 bears the same case number as that of 11 April 1996.

Having re-established communication with the appellant the respondent, on 14 June 1999, initiated the present proceedings in the Family Division of the High Court of Justice in England, seeking an order for the return of his daughter to the Republic of Ireland, pursuant to the provisions of the Hague Convention on the Civil Aspects of International Child Abduction (the Hague Convention) (the Hague, 25 October 1980) (TS 66 (1986); Cm 33), as implemented by the Child Abduction and Custody Act 1985.

The respondent's application was heard substantively on 4 and 5 August 1999 by Hughes J. It was the respondent's case that the relevant child had been habitually resident in the Republic of Ireland immediately before her removal to England in June 1998 and that at the time of that removal he and/or the district court in the Republic of Ireland had 'rights of custody', within the meaning of the Hague Convention, that had been breached by the removal. The appellant conceded that the relevant child had been habitually resident in the Republic of Ireland before her removal to England in June 1998, but denied that either the respondent or the district court had rights of custody in respect of the child at the time of the removal and, in the alternative, denied that the removal had amounted to a breach of any such rights and, further, denied that the respondent was entitled to rely on any rights that were not his own rights. In the further alternative the appellant put forward other defences that were rejected by Hughes J and which are not material to the present appeal. Hughes J rejected the respondent's contention that he, personally, had rights of custody in respect of his daughter at the relevant time and, further, rejected the respondent's contention that the District Court of Carrigaline had rights of custody in respect of the child of the parties at the relevant time. The respondent's application for the return of the child to the Republic of Ireland was, therefore, dismissed, but leave to appeal to the Court of Appeal was granted by Hughes J.

The only issues raised before the Court of Appeal (Morritt, Thorpe and Chadwick LJJ) were the contentions of the respondent that the District Court of Carrigaline had been possessed of rights of custody in respect of the child of the parties at the time of her removal from the Republic of

Ireland, that the removal had amounted to a breach of such rights and that he was entitled to rely upon the breach of the rights possessed by the district court. These contentions were disputed by the appellant.

By its judgment of 11 November 1999 the Court of Appeal accepted the contentions of the respondent and allowed the appeal. Accordingly an order was made that the child be returned to the Republic of Ireland forthwith. The appellant appealed to your Lordships' House pursuant to a grant of leave by this House.

The issues before your Lordships on this appeal are:

(i) Whether a court can ever be an 'institution or any other body' to which rights of custody may be attributed within the meaning of art 3 of the Hague Convention on the Civil Aspects of International Child Abduction (as implemented by the Child Abduction and Custody Act of 1985) and, if so, in what circumstances.

(ii) If such rights of custody may be attributed to a court, whether such rights were in fact to be attributed to the District Court of Carrigaline in the Republic of Ireland, within the meaning of art 3(a) of the said Convention, on the facts of the present case and, if so, whether such rights were actually exercised at the time of removal of the relevant child from the Republic of Ireland or would have been so exercised but for that removal, within the meaning of art 3(b) of the said Convention.

(iii) Whether the removal of the child from the Republic of Ireland by the petitioner on 23 June 1998 was in breach of any rights that may have been attributable to the said District Court of Carrigaline in respect of that child, within the meaning of art 3 of the said Convention.

(iv) Whether it is open to a person who has no rights of custody of his own, within the meaning of art 3 of the said Convention, to rely upon the breach of any rights of custody possessed by a person, institution or body other than himself in proceedings instituted by him under the Child Abduction and Custody Act 1985.

I take these issues in order. At first sight it appears strange to attribute to a court rights of custody but I think it is necessary to consider in some detail the provisions of the Hague Convention bearing on this matter in order to determine whether that preliminary view accords with a proper construction of the Convention.

The objects of the Convention are (a) to secure the prompt return of children wrongfully removed to or retained in any contracting state; and (b) to ensure that rights of custody and of access under the law of one contracting state are effectively respected in the other contracting states. Since this is an international convention to be applied under a variety of systems of law it is right that it should be given a purposive construction in order to make as effective as possible the machinery set up under it. So approaching the matter it appears to me that the phrase in art 8 'any person, institution or other body claiming that a child has been removed or retained in breach of custody rights' may include a court as an

'other body' particularly when one appreciates that the phraseology chosen was deliberately wide. Again the phrase 'rights of custody' are said by art 5 for the purposes of this Convention to include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence; many of the matters relating to the care of the person of the child will consist in duties and powers rather than rights in the narrow sense of that word and in particular the power to determine the child's place of residence being itself characterised as a right underlines the width that should be given to the word 'rights' in this Convention.

While therefore initially sharing the misgivings expressed by Chadwick and Morritt LJJ in the present case and by Lord Prosser in Seroka v Bellah 1995 SLT 204 sitting at first instance in the Court of Session in Scotland I am now of the view that these misgivings should be allayed by these considerations, but the matter does not end there.

The question has arisen in previous cases and I refer first to Re C (a minor) (abduction) [1989] FCR 197; sub nom C v C (minor: abduction: rights of custody abroad) [1989] 2 All ER 465. Lord Donaldson of Lymington MR said ([1989] FCR 197 at 208, [1989] 2 All ER 465 at 473)'

'This is "the right to determine the child's place of residence". This right may be in the court, the mother, the father, some caretaking institution, such as a local authority, or it may, as in this case, be a divided right-insofar as the child is to reside in Australia, the right being that of the mother; but, insofar as any question arises as to the child

residing outside of Australia, it being a joint right subject always, of course, to the overriding rights of the court.'

Although this view was obiter in that case it was founded on Re NB (a minor) (abduction) [1993] 1 FCR 271 at 277; sub nom B v B (abduction" custody rights) [1993] Fam 32 at 38 by Sir Stephen Brown P'

'It seems to me that the court itself had a right of custody at this time in the sense that it had the right to determine the child's place of residence, and it was in breach of that right that the mother removed the child from its place of habitual residence.'

Leggatt LJ said ([1993] 1 FCR 271 at 282, [1993] Fam 32 at 42)"

'Having made what is no more than an interim custody order, the Ontario court, in my judgment, retained what Article 5(a) of the Hague Convention calls "the right to determine the child's place of residence".'

Scott LJ agreed with both of these judgments. This was an essential ground of judgment in that case. The matter has also received detailed consideration by the Supreme Court of Canada first in Thomson v Thomson [1994] 3 SCR 551 in which La Forest J quoting the passage I have already quoted from Sir Stephen Brown P said (at 588):

'I am fully in agreement with this statement. It seems to me that when a court has before it the issue of who shall be accorded custody of a child, and awards interim custody to

one of the parents in the course of dealing with that issue, it has rights relating to the care and control of the child and, in particular, the right to determine the child's place of residence. It has long been established that a court may be a body or institution capable of caring for the person of a child. As I explained in F. (Mrs.) v. Eve [1986] 2 S.C.R. 388, the Court of Chancery has long exercised wardship over children in need of protection in the exercise of its parens patriae jurisdiction. But I see no need to rely on jurisdiction emanating from this doctrine, which has understandably "puzzled and concerned" other Contracting Parties...'

This judgment was a judgment not only of La Forest J himself but also of Lamer CJ and Sopinka, Gonthier, Cory and Iacobucci JJ. The other two judges sitting, L'Heureux-Dubi and McLachlin JJ agreed with La Forest J's interpretation and application of the Convention to the present case and differed on a matter with which your Lordships are not concerned.

It appears from Re S (abduction: separate representation) [1997] 2 FCR 342 that the High Court of New Zealand considered that it had rights of custody in respect of the children who were the subject of that application and was represented before Wall J when he was considering the subject matter of the application, which does not have relevance to the present appeal. The Supreme Court of the Republic of Ireland took the same view in Re HI (a minor), HI v MG [1999] 2 IRLM 1 at 22 in a judgment delivered on 19 February 1999.

We have not been referred to any contrary decision and the report of the third Special Commission meeting to review the

operation of the Hague Convention on the Civil Aspects of International Child Abduction which took place on 17 to 21 March 1997 reported in para 15 the decision of the Supreme Court of Canada that the removal in that case 'breached the custody rights retained by the Scottish court'. The absence from that report of any decision to the contrary strongly suggests that there was none, at least up to that time, and none since then has been brought to our attention. In response to a question from my noble and learned friend Lord Steyn counsel for the appellant stated that he could think of no particular practical difficulty in the adoption of this construction of the Convention except the uncertainty that prevailed and is referred to by Thorpe LJ in the present case as to the circumstances in which the court should be held to have a right of custody.

There are two aspects to this matter. First of all the application to the court must raise matters of custody within the meaning of the Convention and that will require in every case a consideration of the terms of the application. Secondly, a question arises as to the time at which the court acquires such right. It is clear that the interpretation which has been accepted of the Convention which allows the possibility of a court having rights of custody does not contemplate that happening unless there is an application to the court in a particular case raising the issue of the custody of one or more children. The date at which such application confers these rights is a matter which has not been the subject of detailed consideration in relation to the Convention. For the purposes of the Civil Jurisdiction and Judgments Act 1982, Sch 1, art 21 and the 1968 Brussels Convention which is scheduled to that Act it has been held that an English court becomes

definitively seised of proceedings for the purposes of that Convention on the date of service of the writ at which point it has jurisdiction over the merits of the dispute: Neste Chemicals SA v DK Line SA (The Sargasso) [1994] 3 All ER 180 and Dresser UK Ltd v Falcongate Freight Management Ltd (The Duke of Yare) [1992] QB 502, [1992] 2 All ER 450.

In relation to the present Convention while in the wardship jurisdiction the issue of an application made the child who was the subject of the application a ward of court I consider that generally speaking there is much force in using the service of the application as the time which the court's jurisdiction is first invoked. It is true that interim orders may be made before service and special cases may arise but generally speaking I would think it a reasonable rule that at the latest when the proceedings have been served the jurisdiction has been invoked and unless the proceedings are stayed or some equivalent action has been taken I would treat the court's jurisdiction as being continuously invoked thereafter until the application is disposed of. In the present case no difficulty arises on this issue because at the time when the child was removed from Ireland the court had fixed a date for the determination of the application as a result of an earlier hearing at which both parties were represented. I would not think it necessary for the court of the jurisdiction to which the child has been removed to consider whether the pending application in the court of the child's habitual residence was in good faith or with merit. These are questions in my judgment for the court of the habitual residence to determine and if any doubt arises on these matters it should be resolved by application to that court.

In the present case the contest is on whether the application for guardianship which was pending at the date of removal constitutes an application involving rights of custody within the meaning of the Hague Convention. The statutory provisions in Ireland have been carefully described by Thorpe and Chadwick LJJ and there are full reports from experts to which they also refer. It is clear to my mind that under the law of Ireland once an unmarried father is appointed guardian he and the mother have equal rights in respect of the custody in its wider sense of the child. In particular both have the power of decision in relation to these matters and if they cannot agree the matter must be resolved by the court. In this case the mother had been awarded custody by consent but as Thorpe LJ said it was implied in the consent as appears from the terms relating to access that the day-to-day care of the child would be exercised at the mother's address given in the application. Once the father had appointment as guardian he had an equal right with the mother to determine where the child should live and in particular whether the child should be removed from the jurisdiction from the courts of Ireland. I do not regard the award of custody by consent in proceedings which were still pending and in which active consideration of an application for guardianship by the father was taking place at the time of the removal as destructive of the court's power to decide the place of the child's residence. In these circumstances I conclude that the District Court of Carrigaline had rights of custody in respect of H at the time of her removal and that these rights were being exercised by reason of the pending application of her father to be appointed her guardian.

The appellant argued, particularly founding on the opinion of the Court of Appeal delivered by Ward LJ in Re V-B (minors) (abduction: rights of custody) [1999] 2 FCR 371, that the application of the respondent for guardianship did not confer rights of custody on the Irish court. In that case it was held that a right merely to be consulted on residence, or any other issue, without an associated right to object did not amount to a right relating to the care of the person of the child. While consultation was of considerable importance, it had little legal effect and did not amount to a veto. As the Dutch order left the mother free to decide where the children were to reside, and the father could not object, it followed that the father had no rights of custody. In my opinion the application to the court in this case by the father was for a position which gave him much higher rights in relation to the custody of H than were possessed by the father in that case. The father in this case once appointed guardian as I have said had the right to decide and if he and the mother could not agree then application required to be made to the court for the ultimate decision.

That disposes of the second and third issues raised in this appeal. It remains to consider only the fourth which is whether a person other than the holder of custody rights which have been breached by a removal is entitled to found on the wrongful removal. I see no reason in terms of the Convention or otherwise why a person who has invoked the jurisdiction of the court as a result of which the court has rights of custody in respect of a child should not be entitled to apply to the courts of the country to which the child has been wrongfully removed for the restoration of the child to the jurisdiction of his or her habitual residence. It would seem to

me an unnecessary obstacle to the smooth working of the Convention to hold otherwise. Although I have referred to a situation in which the High Court of New Zealand was represented in an English court I would think it more appropriate in most cases that the application for the restoration of the child should be made by the person whose application to the court conferred on it a right of custody rather than the court itself having to undertake that responsibility.

For these reasons which are substantially the same as those given by the Court of Appeal I consider that this appeal falls to be dismissed and the order of the Court of Appeal affirmed. In view of the urgency of the matter the House on 14 December 1999 dismissed this appeal, for reasons to be given later.

JUDGMENT-3:
LORD STEYN. My Lords, I have had the privilege of reading in draft the speech of my noble and learned friend, Lord Mackay of Clashfern. I am in full agreement with the reasons given by Lord Mackay of Clashfern for the dismissal of the appeal.

JUDGMENT-4:
LORD HOPE OF CRAIGHEAD. My Lords, I have had the advantage of reading in draft the speech which has been prepared by my noble and learned friend. Lord Mackay of Clashfern. I agree with it, and for the reasons which he has given I too am of the opinion that the appeal fell to be dismissed.

JUDGMENT-5:
LORD HUTTON. My Lords, I have had the advantage of reading in draft the speech which has been prepared by my noble and learned friend Lord Mackay of Clashfern.

I agree with it, and for the reasons which he has given, I too would dismiss the appeal.

DISPOSITION:
Appeal dismissed.